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No. 75-1785

In the Supreme Court of the United States

OCTOBER TERM, 1976

NELSON G. GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The first opinion of the district court (Pet. App. 26a-43a) is reported at 375 F. Supp. 971. The first opinion of the court of appeals affirming petitioner's conviction (Pet. App. 1a-22a) is reported at 511 F. 2d 910.

The district court did not file a written opinion denying petitioner's motion for a new trial on the grounds of newly discovered evidence. The opinion of the court of appeals on that issue (Pet. App. 83a-88a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 89a-90a) was entered on April 22, 1976, and a petition for rehearing was denied on May 11, 1976 (Pet. App.

91a-92a). The petition for a writ of certiorari was filed on June 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court correctly denied petitioner's motion for a new trial on the ground of newly discovered evidence, where such evidence was proposed testimony that would not contradict any of the evidence of petitioner's guilt.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of aiding and assisting the filing of a false and fraudulent tax return (26 U.S.C. 7206(2)), obstruction of justice (18 U.S.C. 1503), subornation of false declarations (18 U.S.C. 1622), and two counts of conspiracy (18 U.S.C. 371). The court sentenced petitioner to concurrent two-year prison sentences on two counts and fines of $10,000 on the other three counts. The court of appeals affirmed (Pet. App. 1a-22a), and this Court denied certiorari (423 U.S. 924).

Petitioner then filed a motion in the district court for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, asserting the existence of newly discovered evidence. In an opinion delivered from the bench, the district court refused to hold an evidentiary hearing and denied petitioner's motion. The court of appeals affirmed *per curiam* (Pet. App. 83a-88a).

The evidence adduced at trial may be summarized as follows:

While seeking contributions to William Cahill's gubernatorial campaign in New Jersey in July 1969, petitioner approached William Preis, president of Stop & Save

Trading Stamp Corporation, concerning a possible $25,000 cash contribution to the campaign by his company. When Preis indicated that the company could not pay that much in cash, petitioner proposed an "easy solution" whereby Preis would make a $5,000 contribution by check and Gross would provide the company with a bill for services rendered. Petitioner stated that "since it would be passed through as an operating expense it would become tax deductible, and it would actually only cost you half as much" (Pet. App. 3a; Tr. 1911-1912).[1]

Preis asked if this method of payment was legal. Petitioner assured him that if it was discovered, the worst that could happen would be a disallowance of the deduction by the Internal Revenue Service (Pet. App. 3a; Tr. 1948-1949). Thereafter, in September 1969, Preis disguised the $5,000 contribution as a business payment on a fictitious invoice from Writers Associates. This payment was treated by Stop & Save's accounting department as an expense item (Tr. 1953-1957) and was thereafter falsely reported on the income tax return of Grand Union (Stop & Save's parent corporation) as a deductible expense (Tr. 2794).

In March 1973, as part of an investigation of political activities in Bergen County, New Jersey, a federal grand jury issued a subpoena to Stop & Save, requiring production of all of its records relating to Writers Associates. Preis confronted petitioner with the subpoena and the invoice, and asked "Where do we go from here?" (Pet. App. 3a; Tr. 1993). Petitioner responded that Preis should tell the grand jury that the invoice represented payment for services rendered in connection with

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[1] "Tr." references are to the transcript of trial.

a demonstration against an anti-trading stamp bill which had been pending in the state legislature (Pet. App. 3a; Tr. 1994). When Preis asked why he should not tell the facts as they were, petitioner responded that if Preis told the truth to the grand jury "at this late stage of the game, [he would] immediately be cited for conspiracy and for fraud" (Pet. App. 4a; Tr. 1999).

On April 12, 1973, Preis, accompanied by his corporate counsel, met with the government prosecutors. When they questioned him about the Writers Associates invoice, Preis answered with the contrived story about the demonstration. The prosecutors indicated that they did not believe the story and told Preis to reconsider the whole matter and come back and tell the truth to the grand jury (Pet. App. 4a; Tr. 2001).

Preis then met with petitioner and told him what had happened at the United States Attorney's office. At that time, petitioner told Preis that the government would not be able to prove Preis' perjury. Petitioner stated to Preis (Pet. App. 4a; Tr. 2009):

> The only ones that really know the story behind this is [*sic*] myself and Joe McCrane. And I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing, and certainly I'm not going to tell, * * * so you have nothing to worry about for perjury. * * * You can go right back and tell that same story, and you will get off absolutely free.

Thereafter, on April 17, 1973, Preis appeared before the grand jury and "[told] that same story." He falsely testified that the payment to Writers Associates was for a women's demonstration against an anti-trading stamp bill at the State Capitol in Trenton, New Jersey. Preis was later indicted for making false declarations

to a grand jury, in violation of 18 U.S.C. 1623. On advice of new counsel, he pleaded guilty and received permission to go back to the grand jury and tell the truth about his participation with petitioner in the Cahill campaign. The indictment against petitioner followed (Pet. App. 5a; Tr. 2021-2031).

During the trial, Preis testified that petitioner told him "I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing * * * " (Tr. 2009). To corroborate this testimony, the government introduced evidence that McCrane had invoked his Fifth Amendment privilege before the grand jury (Tr. 2855-2862). With respect to the evidence of McCrane's Fifth Amendment claim, the district court instructed the jury that McCrane had a right to claim the privilege and that his doing so had no bearing on whether he would have incriminated himself or petitioner had he testified (Tr. 2781-2782, 2863-2864). At the time of the trial, McCrane was awaiting trial on another indictment and he had indicated, through counsel, that he would invoke his Fifth Amendment privilege if called as a witness at petitioner's trial (Pet. App. 45a).[2]

While the case was pending in the court of appeals, petitioner obtained an affidavit from McCrane which stated that at no time prior to his invocation of the Fifth Amendment before the grand jury did he tell peti-

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[2]McCrane was subsequently convicted of four counts of aiding the preparation of fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). The court of appeals vacated and remanded for a new trial McCrane's conviction on two of the counts (527 F. 2d 906). However, on June 30, 1976, this Court granted the government's petition for a writ of certiorari (No. 75-1464) and remanded the case to the court of appeals for consideration in the light of *United States* v. *Agurs*, No. 75-491, decided June 24, 1976.

tioner that he would make such a claim of privilege (Pet. App. 44a-48a, 85a). Based upon this "newly discovered" evidence, petitioner moved the district court for a new trial under Rule 33 of the Federal Rules of Criminal Prodecure. This district court denied the motion and the court of appeals affirmed *per curiam* (Pet. App. 83a-88a).

ARGUMENT

1. In order to prevail on a Rule 33 motion for a new trial on the basis of newly discovered evidence, a defendant must show that the evidence was discovered after the trial, that the failure to learn of the evidence was not the result of lack of diligence, that the new evidence is not merely cumulative or impeaching, that the evidence is material to the principal issues involved, and that the evidence is of such a nature that it would probably produce an acquittal. *United States* v. *Meyers*, 484 F. 2d 113, 116 (C.A. 3). See also *United States* v. *Slutsky*, 514 F. 2d 1222, 1225 (C.A. 2). When, as here, the "newly discovered" evidence is simply "newly available" evidence (*i.e.*, evidence which existed all along but which was unavailable at trial), the courts have hesitated to consider such evidence to be newly discovered. See, *e.g.*, *United States* v. *Jacobs*, 475 F. 2d 270, 286, n. 33 (C.A. 2), certiorari denied *sub nom. Lavelle* v. *United States*, 414 U.S. 821. See also *United States* v. *Alper*, 449 F. 2d 1223, 1234 (C.A. 3), certiorari denied *sub nom. Greenberg* v. *United States*, 405 U.S. 988.

Petitioner's claim for a new trial is based upon an affidavit of his co-conspirator McCrane that McCrane is prepared to testify as follows: "At no time prior to my assertion before the Grand Jury on April 27, 1973, of my right not to testify on Fifth Amendment grounds, did I ever tell Nelson Gross that I would assert such a plea" (Pet. App. 48a). Petitioner contends (Pet.

12-21) that McCrane's proposed testimony would contradict the trial testimony of William Preis that petitioner told Preis that McCrane would invoke the Fifth Amendment privilege against self-incrimination.

But, as the court of appeals stated (Pet. App. 85a-86a), McCrane's affidavit does not contradict Preis' testimony at trial. All Preis stated was that petitioner told him that "I [petitioner] happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing * * * " (Tr. 2009). McCrane's affidavit does not contradict this statement; it merely states that McCrane did not tell petitioner of his intention to claim the Fifth Amendment before the grand jury.

Thus, assuming the correctness of McCrane's affidavit, petitioner could have learned of McCrane's plans to invoke the Fifth Amendment from sources other than McCrane. Alternatively, petitioner might have been simply speculating to Preis that McCrane would refuse to testify before the grand jury, or petitioner might have lied to Preis. Since petitioner was attempting to convince Preis to give perjured testimony to the grand jury, each alternative explanation satisfactorily eliminates any contradiction between the McCrane affidavit and Preis' testimony. Under these circumstances, petitioner cannot claim that McCrane's testimony would have probably produced an acquittal.[3]

2. Petitioner further argues (Pet. 9-12) that it is unacceptable to reconcile the McCrane affidavit with Preis' testimony on the ground that petitioner was either

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[3]As the court of appeals observed (Pet. App. 85a), if petitioner wanted McCrane to testify on his behalf, he could have sought a continuance in order that McCrane would be tried first and would be available thereafter to testify at petitioner's trial.

speculating or lying to Preis about McCrane's Fifth Amendment claim, because the evidence that McCrane invoked the Fifth Amendment was introduced to corroborate Preis' testimony. However, the fact that petitioner may have been speculating or lying to Preis does not undermine the credibility of Preis' testimony that petitioner told him that McCrane would claim the Fifth Amendment.

The evidence that McCrane claimed the Fifth Amendment was admitted to corroborate the fact that petitioner made those statements to Preis to convince him to testify falsely before the grand jury, and not to demonstrate the truthfulness of those statements. Thus, whether or not petitioner knew in advance that McCrane would claim the privilege, Preis' testimony that petitioner told him about McCrane's Fifth Amendment claim to assure Preis of the safety of embarking upon a course of perjury was corroborated by the evidence that McCrane did in fact claim the privilege before the grand jury.

But even assuming *arguendo* the correctness of petitioner's assertion of a conflict between McCrane's affidavit and Preis' testimony, such a conflict presents at best a question of credibility between McCrane and Preis. Evidence of this nature is insufficient to require a new trial. See, *e.g.*, *United States* v. *Spivey*, 508 F. 2d 1061, 1063 (C.A. 5); *United States* v. *Zane*, 507 F. 2d 346, 348 (C.A. 2), certiorari denied, 421 U.S. 910; *United States* v. *Leyba*, 504 F. 2d 441, 443 (C.A. 10), certiorari denied, 420 U.S. 934. Since petitioner offers no cogent reason why the jury would believe the proposed testimony of McCrane over that of Preis, there is no basis to petitioner's claim that McCrane's testimony would have probably produced an acquittal.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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